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Eddie Clarence Ebbert v. Barbara Ann Ebbert : Brief in Opposition to Certiorari

Utah Supreme Court

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IN THE SUPREME COURT, STATE OF UTAH

DOCKET NO. 870476

EDDIE CLARENCE EBBERT, Plaintiff and Appellant vs. BARBARA ANN EBBERT, Defendant and Respondent.	Appeal No. 870476

On Petition For a Writ of Certiorari to the Utah Supreme Court

BRIEF OF RESPONDENT BARBARA ANN EBBERT IN OPPOSITION

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QUESTIONS PRESENTED

Defendant, Barbara Ann Ebbert, asserts that the decisions of both the Court of Appeals and the trial court were correctly decided, and that neither decision presents any issues warranting the attention of this Court. Therefore, defendant will respond to plaintiff's questions presented, rather than formulating her own questions for review.

UTAH COURT OF APPEAL'S OPINION

The opinion of the Utah Court of Appeals in Ebbert v. Ebbert, Case No. 860229-CA dated November 3, 1987 appears as addendum 1 annexed to plaintiff's Petition for Writ of Certiorari. ("Petition").

JURISDICTION OF THE COURT

Defendant acknowledges that this Court has jurisdiction over plaintiff's Petition for Writ of Certiorari.

CONTROLLING PROVISIONS

The controlling statutory and other provisions are set forth in addendum 1 annexed hereto.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal of a divorce decree rendered by the Honorable Phillip R. Fishler, former judge of the Third Judicial District Court.

Proceedings and Disposition Below

Plaintiff filed a complaint for divorce on June 10, 1985. (Record, hereinafter "R." 2-11). Defendant answered and

counterclaimed and trial was held on March 27, 1986. (R. 12-17) The trial court ordered custody of children to the defendant in accordance with the plaintiff's complaint and the defendant's answer and counterclaim. (R. 328-345). The defendant was ordered to pay child support and nominal alimony. (R. 330). The marital property was divided and the plaintiff was given specific visitation rights. (R. 329-342).

Plaintiff moved for a new trial on May 27, 1986 on the issues of child support, child custody and property division. (R. 276-77). The trial court denied plaintiff's motion for a new trial after hearing on July 1, 1986. (R. 284, 364-384). Thereafter, plaintiff filed a notice of appeal to the Utah Court of Appeals. (R. 289-90).

The Utah Court of Appeals affirmed the trial court's findings and conclusions concerning custody, child support and marital property division, but reversed and remanded the decision with regard to visitation rights. Defendant does not appeal the Court of Appeal's decision on visitation. On appeal the plaintiff claimed that the trial court was biased, but the Court of Appeals held that the plaintiff had waived review of this issue by failing to present evidence at trial concerning bias and by failing to object to the trial court's alleged expressions of bias.

STATEMENT OF FACTS

The parties were married in June of 1976. They are the parents of two daughters ages 7 and 5. On June 11, 1985 the plaintiff filed for a divorce. (R. 2). In his complaint

plaintiff pleaded that custody of the children be awarded to the defendant and that he be awarded extensive visitation rights. (R. 2-11). Defendant answered and counterclaimed also requesting custody of the children with reasonable visitation to the plaintiff. (R. 12-17). In September, 1985 defendant informed the plaintiff that she was planning to move to Colorado. (R. 578).

On November 8, 1985 the case was tentatively settled and the parties presented to the Court a proposed stipulated settlement under which the defendant would be awarded custody of the children. (R. 315-326). The Court accepted the stipulation and heard evidence on grounds, jurisdiction, and the defendant's parental fitness, but the parties were thereafter unable to agree upon form and substance of the findings and decree. (R. 165-68, 205, 312). Both parties drafted numerous versions of stipulated settlements and decrees and each draft thereof, including plaintiff's drafts, placed the children in the custody of the defendant. (R. 101,116; 141-43, 154). The trial court therefore set aside the stipulated settlement and trial was held on March 27, 1986.

On the day of trial the court met with counsel in chambers (not recorded) and at the commencement of trial stated without objection that the issues of jurisdiction, grounds and custody had been previously ruled upon. (R. 406). During the trial plaintiff attempted to amend his pleadings and seek custody of the children. (R. 620). The trial court denied the motion to amend citing concerns over the plaintiff's advanced notice of the issue, his failure to move to amend before trial, and the delay

that amendment would cause. (R. 621). Later during the trial, the plaintiff testified that the defendant had physically abused the children and that he should therefore have custody. (R. 624). The trial court then offered to suspend the proceedings an order and independent custody evaluation. (R. 625). The plaintiff, after consulting with counsel, declined the court's offer and instead retracted his statements related to custody issues. (R. 625).

In its final decree the court granted a divorce, awarded custody of the two children to the defendant, ordered the plaintiff to pay $325 per child per month in child support based on plaintiff's after-tax income of at least $24,000 per year, awarded the defendant nominal alimony for two years, established a visitation schedule, and divided the marital assets and debts. (R. 329; 587; 332-42; 241-54; 256-57). The court filed its findings, conclusions, judgement and decree on May 16, 1986. Plaintiff thereafter moved for a new trial seeking joint child custody which was denied (R. 277), and then appealed to the Utah Court of Appeals.

ARGUMENT: REASONS FOR DENYING THE WRIT

I.

PLAINTIFF'S ALLEGATION THAT HE LOST CUSTODY OF HIS CHILDREN THROUGH PROCEDURAL IRREGULARITIES IS WITHOUT SUBSTANCE, AND FAILS TO PRESENT AN ISSUE MERITING REVIEW BY THIS COURT

Plaintiff's claims that he lost custody of his children without a hearing, based upon an unexecuted stipulation and

because the trial court improperly refused to allow him to amend his complaint were adequately considered by the Court of Appeals and unanimously rejected. They do not merit further review by this Court. Shorn of all rethoric and in light of the record, plaintiff's claim of procedural impropriety reduces itself to one essential allegation: a father in a divorce action is entitled to have the appellate court's review the grant of child custody to the mother notwithstanding that the father affirmatively prayed for such a result in his complaint.

The simple answer to plaintiff's claim of procedural error is that the parties are bound by admissions in their pleadings and statements made at trial. Here, the plaintiff received what he asked for in his complaint: both children in the custody of their mother. No procedural impropriety occurred at trial or before the Court of Appeals.

The plaintiff argues that the trial court should have permitted him to amend his complaint and seek custody of the children pursuant to Rule 15 of the Utah Rules of Civil Procedure. During trial the plaintiff moved to amend his pleadings to ask for custody of the children claiming that the defendant's planned move to Colorado altered his position on custody. The trial court denied the motion because the plaintiff had notice months before trial of the defendant's plans to move to Colorado. The Court of Appeals amply addressed that issue and correctly applied Stratford v. Morgan, 689 P.2d 360, 365 (Utah 1984), which explicitly holds that where a party has notice in advance of trial of

an issue that may be litigated, it is not an abuse of discretion for the trial court to deny a motion to amend the pleadings. The facts below clearly came within Stratford, and this Court does not need to re-examine the firmly established rule last articulated in 1984.

Here, however, the plaintiff did more than simply fail to move to amend his pleadings within a reasonable time before trial. While testifying, plaintiff claimed that the defendant was an unfit mother, in contrast to his complaint. The trial court immediately inquired of the plaintiff concerning his testimony and offered to suspend the proceedings and order a custody evaluation. The plaintiff, after consulting in private with counsel, expressly declined the trial court's offer to make custody an issue.

Plaintiff's citations of Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Stanley v. Illinois, 405 U.S. 645 (1972), (Petition p. 10) are wholly inapposite to the facts below. Plaintiff cites the cases implying his children were taken from him without an adequate hearing. In the case at bar, the father pleaded that the mother should have custody of both children and then expressly declined the court's invitation to inject custody as an issue at trial. Stanley v. Illinois held that an Illinois statute violated equal protection under the Fourteenth Amendment where an unwed father was denied a hearing on his parental fitness before his putative children were taken from him after the

death of their mother. The case concerns presumptions of parental fitness of unwed fathers and has nothing to do with knowing and intentional waiver of custodial rights made in open court as here. Weinberger v. Wiesenfeld held that sex-based distinctions in social security benefits violated the equal protection and due process clauses of the Fifth Amendment and has no relevance to the facts at issue here.

Plaintiff contends that the Court of Appeals based its decision on a stipulation that was never executed by the parties, and relies upon Brown v. Brown, 744 P.2d 333 (Utah App. 1987), as authority that unsigned stipulations may not serve to bind parties to the settlement of a law suit. Plaintiff grossly distorts the opinion of the Court of Appeals which clearly and correctly acknowledges that the stipulated settlements between the parties were never executed and that the trial court never entered judgment based on the stipulations. The Court of Appeals opinion states:

> The [trial] court accepted the stipulated settlement and heard evidence on grounds and jurisdiction. The parties were thereafter unable to agree upon the form and substance of the findings, conclusions, judgment, and decree. Consequently, the trial court set aside the stipulation and set the matter for trial on March 27, 1986.

(Petition, Addendum 1, p. 1).

The Court further states:

> Both by pleading and stipulation, the parties agreed custody should be awarded to defendant. Although the parties were unable to agree on

> proposed findings, conclusions, judgments, and decrees, each draft thereof would have awarded custody to defendant.

Id. at 3.

Plaintiff necessarily misstates the Court of Appeals holding because he realizes an accurate reading of the decision raises no appealable issues of any sort. The Court of Appeals never held that an unsigned stipulation served to bind the plaintiff. It held that the plaintiff's complaint, his failure to amend his pleading before trial and his own testimony acted as a waiver of trial of the custody issue. The Court of Appeals' mention of the unsigned stipulations drafted by plaintiff's counsel which all placed the children in the custody of their mother relates to the evidence supporting the plaintiff's consistent position that the defendant was a proper custodial parent.

II.

THE COURT OF APPEALS' DECISION HOLDING THAT A FATHER CANNOT EVADE HIS CHILD SUPPORT OBLIGATIONS BY IMPUTING THE WEALTH OF THE MOTHER'S PARENTS TO THE MOTHER AND THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DIVIDING THE MARITAL PROPERTY DOES NOT RAISE AN ISSUE WARRANTING FURTHER REVIEW BY THIS COURT

Plaintiff's claim that the Utah Court of Appeal's decision improperly limits the income to be considered in determining

child support and his claims that parental wealth can be attributed to the defendant in determining support are wholly without merit. Despite his self-serving denials, plaintiff's theory is that because the defendant's parents occasionally provided her with gifts those gifts should be treated as part of the defendant's income--thereby reducing or eliminating plaintiff's support obligation. (Petition pp. 15-18).

Plaintiff attempts to argue that Jones v. Jones, 700 P.2d 1072 (Utah 1985), and Kiesel v. Kiesel, 619 P.2d 1374 (Utah 1980), stand for the proposition that a father's duty of support should be reduced if the mother's parents are wealthy. Neither case even hints at such a principle, and the Court of Appeals properly rejected plaintiff's ridiculous theory. This Court has squarely held that the appellant bears the burden of proving that the trial court abused its discretion in setting the amount of child support. McCrary v. McCrary, 599 P.2d 1248, 1250 (Utah 1979); Mitchell v. Mitchell, 527 P.2d 1359,1360 (Utah 1974), and that well recognized principle does not need to be re-enunciated by this Court. Certainly no departure from existing precedent occurs when an intermediate appellate court affirms a trial court's finding that a father earning more than $2,000 net per month can afford to pay child support of $325 per month per child for his two daughters. (Petition, Addendum 1, p. 5). The trial court's finding was well grounded in fact and law and no abuse of discretion occurred.

Plaintiff also asserts that the Court of Appeals ignored his allegations of error by the trial court in dividing the marital property. Plaintiff frames the issue for review as whether it is "an abuse of discretion to award 97% of the marital property to one party...." (Petition p. 17). Plaintiff disingenuously knocks over the straw man he has erected. Similar arguments were made before the Court of Appeals and plaintiff's arguments here are well-plowed ground. The facts below showed that the trial court's division of marital assets was roughly equivalent and not approaching the figures represented by the plaintiff. (R. 412, 555-57, 244-46). Plaintiff cannot show that the values assigned to the marital property by the trial court were a clear abuse of discretion as required under precedents of this Court. See King v. King, 717 P.2d 715, 715-716 (Utah 1986); Turner v. Turner, 649 P.2d 6,8 (Utah 1982), and the Court of Appeals so held. (Petition Addendum 1, p. 6) Plaintiff's spurious claims that defendant received 97 percent of the marital assets are the product of indecipherable arithmetic that do not deserve the attention of this Court.

III.

THE APPLICATION BY THE COURT OF APPEALS OF MEIER v. CHRISTENSEN, AND PILCHER v. STATE DEPARTMENT OF SOCIAL SERVICES IS CORRECT AND DOES NOT DESERVE FURTHER REVIEW

Plaintiff argues that the Court of Appeals improperly failed to consider the issue of judicial bias even though the

plaintiff failed to object to trial to the court's alleged biased conduct, and failed to move under U.R.C.P. 63(b) to disqualify the judge. (Petition p. 18-19) Plaintiff's desperate allegation of bias was rejected by the Court of Appeals because the plaintiff failed to preserve appellate review of the issue by objection or presentation of evidence. This Court has repeatedly held that matters not raised at trial will not be considered on appeal. Pilcher v. State Department of Social Services, 663 P.2d 450, 453 (Utah 1983); see also Corbet v. Corbet, 472 P.2d 430, 433 (1970). Here, the defendant and his trial attorney filed affidavits with their brief to the Court of Appeals claiming bias by the trial court. (Brief of Appellant No. 860229 CA, Addenda 1, p. 2). Meier v. Christensen, 389 P.2d 734 (1964), cited by the Court of Appeals, clearly applies to this situation where the plaintiff-appellant failed to object to the trial court's alleged expressions of bias and thereby waived the issue for appeal. (Petition, Addendum 1, p. 6) Certainly, this Court does not need to reaffirm the principle that failing to object at trial waives appellate review of an issue. Few other principles of law are more firmly established.

Finally, plaintiff's claim that a "mountain of research" (Petition p. 19) has been compiled regarding gender bias in the Utah courts is irrelevant. Plaintiff failed to raise gender bias at trial and that issue was never subject to adversarial testing that would make the issue proper for review on appeal.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

DATED this 13th day of January, 1988.

RESPECTFULLY SUBMITTED,

WATKISS & CAMPBELL

JAMES P. COWLEY
WILLIAM H. CHRISTENSEN

Attorneys for Defendant
Barbara Ann Ebbert

CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of WATKISS & CAMPBELL, 310 South Main Street, Suite 1200, Salt Lake City, Utah, and that pursuant to Rule 47 of the Rules of the Utah Supreme Court, four copies of the attached BRIEF OF RESPONDENT BARBARA ANN EBBERT IN OPPOSITION were caused to be personally served upon:

LOWELL V. SUMMERHAYS
LAW OFFICE OF LOWELL V. SUMMERHAYS
Attorney for Plaintiff and
Appellant
4609 South State Street
Sandy, Utah 84091

KENN M. HANSON
Attorney of record for
Plaintiff and Appellant at trial
5085 South State Street
Salt Lake City, Utah 84107

this 13th day of January, 1988.

William H. Christensen

ADDENDUM

Rule 15. Amended and supplemental pleadings.

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to conform to the evidence.** When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.

(c) **Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

Rule 63. Disability or disqualification of a judge.

(a) **Disability.** If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

(b) **Disqualification.** Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed as soon as practicable after the case has been assigned or such bias or prejudice is known. If the judge against whom the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another judge (naming him) of the same court or of a court of like jurisdiction, which judge shall then pass upon the legal sufficiency of the affidavit. If the judge against whom the affidavit is directed does not question the legal sufficiency of the affidavit, or if the judge to whom the affidavit is certified finds that it is legally sufficient, another judge must be called in to try the case or determine the matter in question. No party shall be entitled in any case to file more than one affidavit; and no such affidavit shall be filed unless accompanied by a certificate of counsel of record that such affidavit and application are made in good faith.